No. 95-85

(4)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

REEBOK INTERNATIONAL LTD. and
REEBOK INTERNATIONAL LIMITED

Petitioners,

v.

BANQUE INTERNATIONALE
A LUXEMBOURG S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE OF BANQUE INTERNATIONALE A LUXEMBOURG S.A. IN OPPOSITION TO MOTION OF AMICUS CURIAE FOR LEAVE TO FILE OUT-OF-TIME BRIEF

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RESPONSE OF BANQUE INTERNATIONALE A LUXEMBOURG S.A. IN OPPOSITION TO MOTION OF AMICUS CURIAE FOR LEAVE TO FILE OUT-OF-TIME BRIEF

The Respondent, Banque Internationale a Luxembourg S.A. ("BIL"), respectfully submits this Response in Opposition to the Motion for Leave to File Out-of-Time Brief (the "Motion") of Amicus Curiae International AntiCounterfeiting Coalition (the "IACC"). As demonstrated below, the IACC's Motion and the brief submitted therewith are untimely pursuant to Sup. Ct. R. 37.2. As such, the Motion should be denied and the brief should be given no consideration by the Court.

ARGUMENT

Rule 37.2 of the Supreme Court Rules governs the filing of *amicus curiae* briefs on a petition for writ of certiorari and provides in pertinent part:

> A brief of an *amicus curiae* submitted prior to the consideration of a petition for a writ of certiorari or a jurisdictional statement, accompanied by the written consent of all parties, **may be filed only if submitted within the time allowed for filing a brief in opposition to the petition for a writ of certiorari** or for filing a motion to dismiss or affirm. A motion for leave to file a brief *amicus curiae* when consent has been refused is not favored. **Any such motion must be filed within the time allowed for the filing of the brief *amicus curiae*. . . .**

Sup. Ct. R. 37.2 (emphasis added).

This rule is mandatory in nature — an untimely *amicus curiae* brief or motion for leave to file same will not be considered by the Court. *See, e.g.*, J. Moore, 13 *Moore's Federal Practice* ¶ 837.11 at SC37-11 (1995) (providing that "timeliness on the part of the amicus in filing the brief is very important" and that any motion for leave to file an *amicus* brief "must be filed within the [Rule 37.2] time periods for filing of the brief.").

The Motion by the IACC in the instant case is untimely. The IACC first requested BIL's consent to the filing of an *amicus* brief on August 23, 1995 — five days after the August 18, 1995 due date for BIL's submission of its Brief in Opposition to the Petition for Writ of Certiorari filed by Reebok.[1] In light of the fact that any *amicus* brief or motion for leave to file same would already have been untimely, BIL's counsel advised the IACC's counsel by letter dated August 24, 1995 that BIL would not consent to the IACC's submission of an *amicus* brief. Thereafter, by Motion dated August 28, 1995, the IACC sought leave to file an untimely *amicus* brief.

The IACC has conceded that its Motion is untimely, but has requested that it be excepted from the timeliness requirement of Sup. Ct. R. 37.2 on the basis that its brief raises important issues that the Court should consider. IACC Motion at 1-2. Rule 37.2 provides for no such exception. Accordingly, the IACC's Motion for leave to file an untimely brief should be denied and the brief should not be considered by the Court.

In any event, the simple fact is that the IACC's brief does *not* raise any issues of importance for this Court. While the IACC's brief boldly proclaims that the decision of the Ninth Circuit will

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[1] The definitions and abbreviations used in BIL's Brief in Opposition to Reebok's Petition for Writ of Certiorari ("BIL Brief") will also be used herein. BIL's List of Interested Parties is included in BIL's Brief at ii-iii.

be a boon for counterfeiters (IACC Brief at 2-5), it fails to present any support for this statement. Indeed, the IACC has not cited a single other case in which a plaintiff has failed to prevent a defendant such as McLaughlin from violating a United States injunction by withdrawing restrained funds from a foreign bank where, as here, the plaintiff had prior knowledge of the identity of the foreign bank. This omission is not surprising since other countries, like Luxembourg in this case, typically have available procedures that allow a plaintiff to obtain legal effect for a United States court order and thereby ensure the continued restraint of illegally laundered funds. *See* BIL Brief at 16-17. The IACC's "boon to counterfeiters" argument ignores reality.

Moreover, the IACC's brief raises no issues of importance because it is built upon a complete misunderstanding of the factual record below. Thus, the IACC liberally sprinkles its brief with findings adverse to BIL made by the District Court, *all* of which were based upon the District Court's clearly erroneous conclusion that the *Heatherdale* court in Luxembourg had not been apprised of the Restraining Order when it ordered BIL to release the funds. *See* IACC Brief at 3, 10, 11. In fact, as the Court of Appeals correctly concluded, "[t]he Heatherdale Order was issued with full knowledge of both the TRO and its ineffectiveness under Luxembourg law." App. at 59a.

Finally, the IACC brief raises no issues of importance because it reflects a fundamental misunderstanding of the Ninth Circuit's decision. The IACC complains that the Ninth Circuit did not perform the balancing test required when applying a United States judicial decree extraterritorially. IACC Brief at 15-18. In fact, however, the Ninth Circuit conducted an exhaustive balancing test, weighing the various factors in favor of and against the exercise of jurisdiction over BIL in this case. App. at 59a-61a. In light of the specific factual record which

established, *inter alia*, that BIL had no presence in the forum, that all relevant conduct took place in Luxembourg and that BIL was compelled by Luxembourg law, including the *Heatherdale* Order, to release the funds to McLaughlin, the Ninth Circuit ultimately concluded:

> Thus, *on balance*, fairness . . . dictates that personal jurisdiction must fail in this case.

App. at 61a (emphasis added).[2]

The IACC's real complaint is that the Ninth Circuit conducted a balancing test at all. According to the IACC, the location of BIL's conduct was irrelevant and, therefore, the Ninth Circuit should have disregarded the fact that BIL was a foreign national located on foreign soil acting under compulsion of foreign law, and simply decreed a *per se* rule that the Restraining Order was binding upon BIL because United States injunctions bind the world. *See* IACC Brief at 11-13. Needless to say, the IACC has presented no good reason for this Court to create such an expansive rule of law and thereby disregard the well-settled principles of comity and due process that guided the Ninth Circuit in reaching its decision.[3]

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[2] The IACC attempts to make much of the fact that BIL maintains a small representative office in New York. IACC Brief at 8 n.5, 11. However, the record below confirmed that BIL's New York representative office had absolutely no involvement in the relevant events and, in fact, is strictly prohibited under New York banking laws from engaging in any banking business whatsoever. Ex.R. at 64. Based upon this factual record, both the District Court and the Court of Appeals recognized that BIL does not do business anywhere in the United States. App. at 21a, 47a, 53a. Upon weighing all of the facts of this case, the Court of Appeals correctly determined that BIL could not be subject to jurisdiction.

[3] In an effort to suggest that the Ninth Circuit's decision conflicts with decisions of this Court and other Courts of Appeal, the IACC has effectively

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CONCLUSION

The IACC's brief is untimely and raises no issues of importance warranting consideration by this Court. BIL respectfully submits that the Motion for Leave to File Out-of-Time Brief should be denied.

Dated: September 8, 1995

Respectfully submitted,

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adopted the same arguments advanced by Reebok in its Petition. *See* IACC Brief at 8-17. Just as with Reebok's showing, all of the cases cited by the IACC are distinguishable from this case and do not even remotely conflict with the Ninth Circuit's decision. *See* BIL Brief at 12-16.